U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 16 August 2006

In the Matter of:

L. B.,
Claimant,

v. CASE NO: 2003 BLA 6652

NEW ACTON COAL MINING COMPANY, INC.,
Employer

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest

Appearances:

Patrick Nakamura, Esq.
For the Claimant

Lance Yeager, Esq.
For the Employer

Before: Edward Terhune Miller
Administrative Law Judge

DECISION AND ORDER – AWARDING BENEFITS

STATEMENT OF THE CASE

Introduction

This proceeding involves a claim for benefits filed under the Black Lung Benefits Act, as amended, 30 U.S.C. § 901 et seq. ("Act"), and the regulations promulgated thereunder.[1] Benefits

[1] All applicable regulations which are cited in this Decision and Order are included in Title 20, Code of Federal Regulations. The Director's exhibits are denoted "D-"; Claimant's

under the Act are awarded to miners who are totally disabled due to pneumoconiosis and to the survivors of miners who had pneumoconiosis and were totally disabled at the time of their death or whose death was caused by pneumoconiosis. Pneumoconiosis is a chronic dust disease of the lungs, including respiratory and pulmonary impairments arising out of coal mine employment, and is commonly referred to as black lung.

ISSUES

The following issues were designated for adjudication at the time this claim was referred to the Office of Administrative Law Judges:

1. The timeliness of the instant claim.
2. Whether Claimant suffers from pneumoconiosis.
3. If so, whether Claimant's pneumoconiosis arose out of his coal mine employment.
4. Whether Claimant suffers from total respiratory disability.
5. Whether this total respiratory disability is due to pneumoconiosis.
6. The appropriate number of dependents for augmentation of benefits.
7. Whether employer can recover costs resulting from Claimant's failure to appear at the first scheduled hearing.
8. The length of Claimant's qualifying coal mine employment.

The Employer also contests the constitutionality of the most recent amendments to the Secretary's regulations. This argument is preserved for appeal.

This is an initial claim for benefits. The Form CM-1025 incorrectly lists "Subsequent Claim" as an issue. The Employer has withdrawn the issue of responsible operator and does not contest that Claimant was a "miner" for any period of his work with Employer. Tr. 7.

Because Employer has conceded the existence of complicated pneumoconiosis, but denies that it is caused by coal mine employment, the principal issue before this tribunal as framed by the parties is whether Claimant's complicated pneumoconiosis arose out of his coal mine dust exposure.

FINDINGS OF FACT

Background and Procedural History

L.B. ("Claimant") filed the instant claim on March 18, 2002. D-2. On November 18, 2002, the District Director issued a *Schedule for the Submission of Additional Evidence*. D-16. The District Director concluded that the evidence submitted for this claim would be sufficient to support entitlement to benefits. On May 20, 2003, the District Director issued a *Proposed Decision and Order – Award of Benefits – Responsible Operator*. D-21. The employer, acting through counsel, petitioned for a formal hearing by a request filed June 11, 2003. D-22. On

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exhibits, "C-"; Employer's exhibits "E-"; and citations to the transcript of the hearing, "Tr."

September 19, 2003, this claim was referred to the Office of Administrative Law Judges for a formal hearing. D-25.

A formal hearing was scheduled for March 10, 2004 pursuant to a Notice of Hearing, dated December 3, 2003. Neither Claimant nor any representative on his behalf appeared and employer moved to dismiss and, in the alternative, requested that a show cause order issue. On April 29, 2004, Administrative Law Judge Gerald M. Tierney issued an Order directing Claimant to show cause why the claim should not be dismissed. Claimant responded by letter dated May 5, 2004 representing that he had not received notice of the hearing, and requested that a second hearing be scheduled. On June 14, Judge Tierney issued a Notice of Hearing, setting a new hearing date for September 30, 2004. On September 10, 2004, Claimant requested a continuance, explaining that he was in the process of securing legal representation, but that a new attorney would be unable to prepare for the hearing as scheduled. Employer did not oppose this request, and a continuance was granted. The formal hearing was conducted on April 20, 2005, in Birmingham, Alabama. At the hearing, Claimant's Exhibits 1-3 (C-1-3), Director's Exhibits 1- 25 (D-1-25), and Employer's Exhibit 1 (E-1) were received into evidence.[2]

Hearing and Deposition Testimony

Claimant testified in two depositions and at the formal hearing.[3] Claimant was 51 at the time of the hearing. Tr. 34. Claimant testified that the coal mine work history form admitted as Director's Exhibit 3 was a close representation of his coal mine employment. Tr. 20. He testified that he "worked part of the twelve" years shown on the form. *Id*. The twelve year interval included approximately one year of "down time." Tr. 21. He explained the sometimes sporadic nature of this work: "A lot of times I'd go, have another job when that one played out, you know, just swap over." *Id*.

In his June 21, 2002 deposition, Claimant testified in some detail about his employment, and recalled that he first worked in mining with Fells Energy in April, 1978, and continued with this mine until September, 1978. D-15 at 8, 10-11. He was unemployed for two months until he signed on with Energy Enterprises from November 1978 until January 1979. D-15 at 12. After three months in construction, Claimant started with M L & M Mining on April 18, 1979, and left this employer after one year in April 1980. D-15 at 13. After one month away from the mines, Claimant went to work for Mineral Extractors in May, 1980 until "June or July. D-15 at 14. Claimant spent four or five months in non-coal mine work, and then was employed by Basin Coal Company for "[p]robably three years."[4] D-15 at 16. Following this employment, Claimant worked for Dixie Fuels for one and one-half years, starting in April 1983, before returning to

[2] Director's Exhibits, Tr. 17 - 18; Claimant's Exhibits, Tr. 13 - 15; Employer's Exhibit, Tr. 39 - 40.

[3] Claimant's deposition testimony was recorded on June 21, 2002 and February 21, 2005. D-15; E-1.

[4] The coal mine employment Form CM-911a lists "Basin Coal Company", "New Acton" and "King Par" companies for the interval from June 1980 until April 1983. D-3. The Social Security Earnings Statement lists extensive earnings from Basin Coal, New Acton and Dixie Fuels from 1980 until 1985. D-6.

New Acton for one year starting in July, 1984. D-15 at 17. Claimant then went to work in strip mining for McClardy Construction for two years starting in June 1986. D-15 at 19-20. He then returned to New Acton, in July 1988 for about a "year and a half, maybe two years." D-15 at 20.

Claimant described the nature of his last coal mine work as a driller. This work appeared to be "a fairly easy job." Nevertheless, work at the drill site entailed a considerable amount of coal mine dust exposure. Tr. 25-26. A driller would also have to clean out the debris from around the drill site and use a twenty-pound sledge hammer as part of the procedure required to change a drill bit, which would weigh between 60 and 75 pounds. Tr. 27.

With respect to his breathing condition, Claimant testified that he was required a "keep a pillow … elevated" to assist in sleeping. He said that his breathing has affected his activities. He has to stop and rest to catch his breath after climbing twenty steps. Tr. 28-2.

Claimant presently works with a company that performs cable inspections on overhead cranes. He is required to grease fittings on these machines, using a hand held grease gun. He considered this relatively light work. Tr. 30-31. He testified that he has difficulty in climbing ladders and stairs in this job, but is apparently carried by other workers. Tr. 32. Other than climbing, this inspection work does not require physical activities, such as stooping, bending or crawling. Tr. 33. Claimant testified that he smoked at one time, starting that habit when he was twenty, but that he quit in 2004 and does not smoke now. Tr. 33. Claimant is married, and lives with his spouse. He pays child support for an eight-year-old son and has a daughter who is twenty months old. Tr. 36. He uses an inhaler to assist in his breathing. He testified on cross-examination that his current work is becoming difficult. He has to stop and catch his breath two or three times per day. Tr. 38.

Medical Evidence

X-Ray Evidence[5]

The following x-ray interpretations have been submitted for this claim:

Exh. No.	X-ray Date Reading Date	Physician	Qualifications	Film Quality	Interpretation
D-11	09-25-2002 09-25-2002	J. Hasson	B D-11	1	2/2, r,q, "B" large opacities

[5] The following abbreviations are used in describing the qualifications of the physicians: B-reader, "B"; board-certified radiologist, "BCR".

Exh. No.	X-ray Date Reading Date	Physician	Qualifications	Film Quality	Interpretation
D-11	09-25-2002 10-11-2002	A. R. Goldstein	B D-11	1	Quality reading Dr. Goldstein also detected a "coalescence of small opacities" by marking the symbol "ax" He also found bullae and signs of emphysema.
C-2	02-15-2005 03-04-2005	A. Ahmed	B/BCR C-2	2	2/1, q,r, complicated pneumoconiosis, Category "B", film quality 2
C-3	02-15-2005 03-09-2005	E. Cappiello	B/BCR[6]	2	2/3, q,p, complicated pneumoconiosis, Category "C", film quality 2

Pulmonary Function Studies

Pulmonary function studies are tests performed to measure obstruction in the airways of the lungs and the degree of impairment of pulmonary function. These tests are also acceptable documentation for a medical opinion diagnosis of pneumoconiosis. The greater the resistance to the flow of air, the more severe the lung impairment. The studies range from simple tests of ventilation to very sophisticated examinations requiring complicated equipment. The most frequently performed tests measure forced vital capacity (FVC), forced expiratory volume in one-second (FEV1) and maximum voluntary ventilation (MVV).

The quality standards for pulmonary function studies are set forth at § 718.103 and Appendix B. In a "qualifying" pulmonary study, the FEV1 must be equal to or less than the applicable values set forth in the tables in Appendix B of Part 718, and either the FVC or MVV must be equal to or less than the applicable table value, or the FEV1/FVC ratio must be 55% or less. § 718.204(b)(2)(i) (2004). *See Grundy Mining Co. v. Flynn*, 353 F.3d 467, 471 n. 1, 23 B.L.R. 2-44 (6th Cir. 2003); *Director, OWCP v. Siwiec*, 894 F.2d 635, 637 n. 5, 13 B.L.R. 2-259 (3d Cir. 1990).

The following chart summarizes the results of the pulmonary function studies available in connection with the current claim.[7] "Pre" and "post" refer to administration of bronchodilators. If only one figure appears, bronchodilators were not administered.

[6] Dr. Capiello served as an Assistant Professor of Radiology at the Albert Einstein College of Medicine from 1976 to 1980. C-3.

[7] Claimant's height has been measured at 70" and 71". I find that Claimant's height for evaluation of these tests is 70.5". *See Protopappas v. Director, OWCP*, 6 B.L.R. 1- 221 (1983). *See also Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109, 114, 116, 19 B.L.R. 2-70 (4th Cir.

Ex. No. Date Physician	Age Height	FEV1 Pre-/ Post	FVC Pre-/ Post	FEV1/ FVC Pre-/ Post	MVV Pre-/ Post	Qualify	Impression cooperation comprehension tracings
D-11[8] 09-25-2002 J. Hasson	48 71"	1.31	3.02	43%	51	Yes	Good cooperation and comprehension … tracings are attached Dr. Hasson observed that "Spirometry reveals a severe obstructive ventilatory impairment. The MVV is severely reduced."
C-1 10-15-2004 A. Goldstein	50 70"	1.74 1.75	3.89 3.93	92% 93%	70 64	Yes	Good effort in performance of test. Tracings attached.

Arterial Blood Gas Studies

Blood gas studies are performed to measure the ability of the lungs to oxygenate blood. A defect will manifest itself primarily as a fall in arterial oxygen tension either at rest or during exercise. The quality standards for arterial blood gas studies performed before January 19, 2001, are found at § 718.105 (2000), while the quality standards for tests conducted subsequent to that date are set forth at § 718.105 (2003). The following chart summarizes the arterial blood gas studies available in this case. A "qualifying" arterial gas study yields values that are equal to or less than the applicable values set forth in the tables in Appendix C of Part 718. If the results of a blood gas test at rest do not satisfy Appendix C, then an exercise blood gas test can be offered. Tests with only one figure represent studies at rest only. Exercise studies are not required if medically contraindicated. § 718.105(b).

The following arterial blood gas study evidence was developed for this claim:

Exhibit Number	Date Altitude	Physician	pCO2 at rest/ exercise	pO2 at rest/ exercise	Qualify	Impression
D-11	09-25-2002 n/a	J. Hasson	32.8 39.5 (Ex)	88.8 64.3 (Ex)	non-qualifying regardless of altitude	Dr. Hasson noted that this study showed that the resting ABG was "normal w mild hypoxemia" while there was a drop in the O2 with exercise.

1995).

[8] This ventilatory study was reviewed and validated on October 22, 2002 by Dr. John Michos, a board-certified pulmonary specialist. D-11.

Exhibit Number	Date Altitude	Physician	pCO2 at rest/ exercise	pO2 at rest/ exercise	Qualify	Impression
C-1	10-15-2004 n/a	A. Goldstein	39	76	non-qualifying regardless of altitude	

Medical Opinions

Dr. Jack Hasson. Dr. Hasson examined Claimant on September 25, 2002 at the request of the Department of Labor. See 30 U.S.C. § 923(b). He submitted his medical report on September 27, 2002. D-11. Dr. Hasson is board-certified in internal medicine, critical care medicine and pulmonary disease. He is also a B-reader. D-11.

Dr. Hasson recorded a coal mine employment history of 12 years, and noted that Claimant worked as a drill operator in strip mining. Claimant's previous health history included arthritis and allergies. Claimant admitted to Dr. Hasson that he was currently smoking at the rate of one pack per day, and had been doing so for 27 years since the age of 21. Claimant presented with current complaints of wheezing and dyspnea. On physical examination, Dr. Hasson observed bilateral expiratory wheezes on auscultation, and resonance on percussion. There were no positive findings on examination of the extremities.

Dr. Hasson diagnosed complicated pneumoconiosis, progressive massive fibrosis, based on the chest x-ray, history, and physical examination.[9] He also diagnosed chronic obstructive pulmonary disease. Both conditions resulted in "severe" impairment. Dr. Hasson attributed Claimant's pneumoconiosis to "coal mining and rock dust" and the COPD to smoking.

Dr. Allan R. Goldstein. Dr. Goldstein submitted a treatment note based on his evaluation of Claimant on October 15, 2004. C-1. Dr. Goldstein is board-certified in internal medicine and pulmonary disease. He has been an instructor of medicine at the Case Western Reserve University, and was a Clinical Assistant Professor at the University of Alabama from 1978 until 1981. He is also a B-reader. D-11.

He recorded a patient history that included "complicated coal workers' pneumoconiosis," and noted complaints of shortness of breath, coughing and wheezing. Claimant uses an inhaler and takes Advair.

Dr. Goldstein reported that Claimant has smoked "less than a pack of cigarettes a day for about 27 or 28 years." He also reported that Claimant worked in a rock quarry for about six or eight months in 1972, and that he was exposed to rock dust during this period. Claimant worked in strip mining from 1978 until 1990, and was exposed to coal dust, rock dust and diesel fumes during this employment.

[9] An additional basis specified by Dr. Hasson is illegible. D-11

On physical examination of the chest, Dr. Goldstein observed normal percussion, heard on auscultation "[d]ecreased breath sounds with a few wheezes heard at the right base [which] did not clear with deep breath or cough." A chest x-ray confirmed the presence of complicated pneumoconiosis. A pulmonary function study showed "an obstructive defect with no reversal following bronchodilators."

Dr. Goldstein diagnosed complicated pneumoconiosis and chronic obstructive pulmonary disease secondary to smoking.

DISCUSSION AND CONCLUSIONS OF LAW

Timeliness

Employer contests the timeliness of this claim. Section 728.308 of the Secretary's regulations in part sets forth a rebuttable presumption that every claim for benefits is timely. § 725.308. This presumption has not been rebutted by evidence of record. There is no record of any medical diagnosis of a totally disabling coal workers' pneumoconiosis sufficient to have triggered the statute of limitations outside of the time Claimant filed for benefits under the Act

Because Claimant filed this application for benefits after March 31, 1980, Part 718 applies. *Saginaw Mining Co. v. Ferda*, 879 F.2d 198, 204, 12 B.L.R. 2-376 (6th Cir.1989). This claim is governed by the law of the United States Court of Appeals for the Eleventh Circuit, because Claimant was last employed in the coal industry in the State of Alabama. D-4. *See Kopp v. Director, OWCP*, 877 F.2d 307, 12 B.L.R. 2-299 (4th Cir. 1989); *Shupe v. Director, OWCP*, 12 B.L.R. 1-200 (1989) (en banc).

Elements of Entitlement

In order to establish entitlement to benefits under Part 718, the Claimant must establish that he suffers from pneumoconiosis, that his pneumoconiosis arose out of his coal mine employment, and that his pneumoconiosis is totally disabling. §§ 718.1, 718.202, 718.203 and 718.204 (2004). *U. S. Steel Mining Company, LLC v. Director*, *OWCP* [*Jones*], 386 F.3d 977, 981, __ B.L.R. ___ (11th Cir. 2004); *Lollar v. Alabama By-Products Corp.*, 893 F.2d 1258, 1262, 13 B.L.R. 2-277 (11th Cir. 1990); *Gee v. W. G. Moore and Sons*, 9 B.L.R. 1-4 (1986) (en banc). *See Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 141, 11 B.L.R. 2-1 (1987). *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 207, 22 B.L.R. 2-162 (4th Cir. 2000). The failure to prove any requisite element precludes a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 B.L.R. 1-111 (1989); *Perry v. Director, OWCP*, 9 B.L.R. 1-1 (1986) (en banc).

In the "Introduction" to its post hearing brief, Employer declares that, while the evidence does demonstrate pneumoconiosis, the Claimant has failed to establish total disability due to pneumoconiosis. Employer's Post-Hearing Brief at 1. In the "Argument" portion of its brief, Employer further states:

> The medical evidence confirms that the [Claimant] does have complicated pneumoconiosis. Therefore, existence of the disease and total disability is irrebuttably presumed. However, it is [Employer's] position that the evidence fails to establish more than ten years of work in the mining industry, and therefore cause of total disability is not to be presumed. It is further our position that the medical evidence fails to establish that the [Claimant's] disability is caused by coal dust exposure, and instead it appears that the most likely cause of the plaintiff's condition is smoking.

Employer's Post-Hearing Brief at 6.

Because Claimant suffers from complicated pneumoconiosis, the principal issue is whether that pneumoconiosis arose out of his coal mine dust exposure. If Claimant establishes at least ten years of qualifying coal mine employment, causality will be rebuttably presumed. § 718.203(b). If Claimant does not establish this threshold, then a nexus between his pneumoconiosis and his coal mine dust exposure must be established by competent medical evidence. § 718.203(c).

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Pneumoconiosis

Employer has conceded that Claimant suffers from complicated pneumoconiosis. An independent review of the record establishes that Claimant suffers from complicated pneumoconiosis based on the chest x-ray evidence of record. Section 718.202(a)(3) provides for a finding of pneumoconiosis "[I]f the presumptions described in §§ 718.304, 718.305 or § 718.306 are applicable[.]" § 718.202(a)(3). Section 718.304 provides:

> **§ 718.304 Irrebuttable presumption of total disability or death due to pneumoconiosis.**
>
> There is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis, that a miner's death was due to pneumoconiosis or that a miner was totally disabled due to pneumoconiosis at the time of death, if such miner is suffering or suffered from a chronic dust disease of the lung which:
>
> (a) When diagnosed by chest X-ray (see § 718.202 concerning the standards for X-rays and the effect of interpretations of X-rays by physicians) yields one or more large opacities (greater than 1 centimeter in diameter) and would be classified in Category A, B, or C in:
>
> (1) The ILO-U/C International Classification of Radiographs of the Pneumoconioses, 1971, or subsequent revisions thereto; or
>
> (2) The International Classification of the Radiographs of the Pneumoconioses of the International Labour Office, Extended Classification (1968) (which may be referred to as the ''ILO Classification (1968)''); or

(3) The Classification of the Pneumoconioses of the Union Internationale Contra Cancer/Cincinnati (1968) (which may be referred to as the ''UICC/Cincinnati (1968) Classification'')[.]

* * *

§ 718.304(a). These regulations implement Section 411(c)(3) of the Act, 30 U.S.C. § 921(c)(3).

Because Claimant is deemed to have complicated pneumoconiosis by Employer's concession, the irrebuttable presumption specified by §718.304 establishes that he is totally disabled due to pneumoconiosis. To the extent that the concession and presumption are not dispositive, there remains as an issue Employer's contention that Claimant's complicated pneumoconiosis did not arise out of coal mine dust exposure.

Based upon a "qualitative," as well as a quantitative evaluation of the x-ray readings, *see Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 B.L.R. 2-77 (6th Cir. 1993), Claimant has established the existence of complicated pneumoconiosis by a preponderance of the record evidence. §§ 718.202(a)(3), 718.304(a). The record contains four x-ray interpretations of two films. One interpretation is by Dr. Hasson, a B-reader. Two positive readings were rendered by Drs. Ahmed and Capiello, who are dually qualified as board-certified radiologists and B-readers. *See Staton v. Norfolk & Western Railway Co*., 65 F.3d 55, 57, 19 B.L.R. 2-271 (6th Cir. 1995). *See also Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211 (1985). *Accord Zeigler Coal Co. v. Director*, *OWCP* [*Hawker*], 326 F.3d 894, 899, __ B.L.R. ___ (7th Cir. 2003). Three of the readings demonstrate the presence of complicated pneumoconiosis. The fourth reading is for film quality only. On the basis of this x-ray evidence, Claimant has demonstrated that he suffers from complicated pneumoconiosis.

The Eleventh Circuit has not formally adopted the view, expressed by the Third and Fourth Circuits, that the adjudicator must weigh all of the evidence together in reaching a finding as to whether a miner has established that he has pneumoconiosis. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 B.L.R. 2-162 (4th Cir. 2000). *See Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 B.L.R. 2-104 (3rd Cir. 1997). *See U. S. Steel Mining Company, LLC v. Director*, *OWCP* [*Jones*], 386 F.3d at 991 (*Compton* not binding authority). Although it appears that a claimant may establish the existence of pneumoconiosis by satisfying a single element of Section 718.202(a), the weight of all relevant evidence in this record establishes the existence of pneumoconiosis, which is complicated in nature. Dr. Hasson's diagnosis of complicated pneumoconiosis rests on more than the chest x-ray. Under the circumstances here his opinion comprises a "more probative basis to prove the existence of [complicated] pneumoconiosis." *Jones*, 386 F.3d at 991 (quoting with approval administrative law judge's rationale).

With the establishment of complicated pneumoconiosis, the salient issue is whether Claimant has established at least ten years of qualifying coal mine employment. Section 718.203(b) of the Secretary's regulations provides:

§ 718.203 Establishing relationship of pneumoconiosis to coal mine employment.

(a) In order for a claimant to be found eligible for benefits under the Act, it must be determined that the miner's pneumoconiosis arose at least in part out of coal mine employment. The provisions in this section set forth the criteria to be applied in making such a determination.

(b) If a miner who is suffering or suffered from pneumoconiosis was employed for ten years or more in one or more coal mines, there shall be a rebuttable presumption that the pneumoconiosis arose out of such employment.

(c) If a miner who is suffering or suffered from pneumoconiosis was employed less than ten years in the nation's coal mines, it shall be determined that such pneumoconiosis arose out of that employment only if competent evidence establishes such a relationship.

§ 718.203.

If Claimant is credited with ten years or more of coal mine employment, he will have established entitlement to benefits by virtue of the presumption of total disability due to complicated pneumoconiosis and the presumption that such pneumoconiosis arose out of coal mine employment, if unrebutted. § 718.203(b).

Length of Coal Mine Employment

Claimant has asserted that he worked at least 10 years in coal mine employment. The District Director found a total of 10 years and 8 months in the mines. Because the parties have not stipulated to the length of the miner's employment, the regulations at § 718.301(a) provide that "[t]he length of the miner's coal mine work history must be computed as provided by § 725.101(a)(32)." § 718.301. Section 725.101(a)(32) provides in part:

(32) *Year* means a period of one calendar year (365 days, or 366 days if one of the days is February 29), or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 "working days." A "working day" means any day or part of a day for which a miner received pay for work as a miner, but shall not include any day for which the miner received pay while on approved absence, such as vacation or sick leave. In determining whether a miner worked for one year, any day for which the miner received pay while on an approved absence, such as vacation or sick leave, may be counted as part of the calendar year and as partial periods totaling one year.

(i) If the evidence establishes that the miner worked in or around coal mines at least 125 working days during a calendar year or partial periods totaling one year, then the miner has worked one year in coal mine employment for all purposes under the Act. If a miner worked fewer than 125 working days in a

year, he or she has worked a fractional year based on the ratio of the actual number of days worked to 125. Proof that the miner worked more than 125 working days in a calendar year or partial periods totaling a year, shall not establish more than one year.

(ii) To the extent the evidence permits, the beginning and ending dates of all periods of coal mine employment shall be ascertained. The dates and length of employment may be established by any credible evidence including (but not limited to) company records, pension records, earnings statements, coworker affidavits, and sworn testimony. If the evidence establishes that the miner's employment lasted for a calendar year or partial periods totaling a 365-day period amounting to one year, it shall be presumed in the absence of evidence to the contrary, that the miner spent at least 125 working days in such employment.

(iii) If the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year, then the adjudication officer may use the following formula: divide the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS). A copy of the BLS table shall be made part of the record if the adjudication officer uses this method to establish the length of the miner's work history.

(iv) No periods of coal mine employment occurring outside the United States shall be considered in computing the miner's work history.

§ 725.101(a)(32) (2005).

The BLBA Manual Exhibit 610 sets forth the average earnings of workers in coal mining based on year of 125 days. D-21 The Benefits Review Board has disapproved the calculation of coal mine employment based on the "125 day" year. *See Clark v. Barnwell Coal Co.*, 22 B.L.R. 1-275 (2003). The earnings as documented by Claimant's deposition and hearing testimony, *see* D-15; E-1, the coal mine employment history form, D-3, the "Description of Coal Mine Work and other Employment," D-4, and the Social Security Earnings Statement, D-6, serve as an initial basis for a computation of coal mine employment pursuant to § 725.101(a)(32)(iii). It is appropriate to credit the miner's testimony with respect to periods of undocumented, or under reported, earnings.

The evidence relevant to his coal mine employment provides the basis for crediting Claimant with ten years and four months of qualifying coal mine employment. Claimant's testimony and the representations in the coal mine history form are credible. *See Harkey v. Alabama By-Products Corp.*, 7 B.L.R. 1-26 (1984). Notwithstanding, accounting for any uncertainty in Claimant's recollection, the SSA earnings statement provides reliable corroboration, backup, and independent proof. *See Tackett v. Director*, *OWCP*, 6 B.L.R. 1-839 (1984).

Claimant is properly credited with 23 months of coal mine employment for the three year period from 1978 through 1980. This total includes six months with Fells Energy from April until September 1978. D-3; D-15 at 10-11. Two months are credited for employment with Energy Enterprises from November 1978 until January 1979. D-3; D-15 at 12. Claimant worked for twelve months with M L & M Mining from April 1979 through April 1980. D-3; D-15 at 13. Two additional months are credited for employment with Mineral Extractors from April through June 1980. D-3; D-15 at 14. Finally, Claimant is properly credited with one month with Basin Coal Company at the end of 1980. D-16.

The Social Security Earnings Statement documents consistent earnings from 1981 through 1988 that corroborate Claimant's testimony and representations to the effect that he was consistently employed during that period of time. *See* D-3; D-6; D-15 at 16-20. Claimant is properly credited with 8 years of coal mine employment for this period.

Claimant is properly credited with five months of coal mine employment for 1989. He testified that he worked for New Acton for "a year and a half, maybe two years" after returning from McCarty Construction in mid-1988. D-20. The SSA statement and his work history document nearly one-half year for 1989. Employer has pointed out that Claimant testified that he purchased a backhoe for his self-employment in November 1989, about six to seven months after leaving New Acton. This would place Claimant's departure from New Acton in May 1989.

Because Claimant has established at least ten years of coal mine employment, there is a rebuttable presumption that his complicated pneumoconiosis arose out of his coal mine employment. § 718.203(b). Given the operation of the irrebuttable presumption set forth at Section 718.304, Claimant has established that he is totally disabled due to pneumoconiosis arising out of his coal mine employment. Therefore, Claimant has established entitlement to benefits under the Act.[10] "The presumption operates conclusively to establish entitlement to benefits." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 11 (1975).

In the alternative, assuming that Claimant has not established at least ten years of coal mine employment, he has proven that his complicated pneumoconiosis arose out of his coal mine employment.[11] Dr. Hasson attributed Claimant's complicated pneumoconiosis to coal mine dust exposure, while concluding that Claimant's chronic obstructive pulmonary disease was due to Claimant's many years of smoking. Dr. Hasson's opinion is both reasoned and sufficiently documented to establish the causality of Claimant's complicated pneumoconiosis. § 718.203(c). Notwithstanding that Claimant is currently employed and experiences exposure to industrial fumes and the by-products of steel production in his current work, this industrial exposure is not deemed on the instant record significantly to detract from Dr. Hasson's attribution of the complicated pneumoconiosis to Claimant's coal mine dust exposure. That attribution has not been substantially contradicted or rebutted.

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[10] This tribunal has carefully reviewed the record as a whole. In view of the irrebuttable presumption provided by Section 718.304, it is unnecessary to evaluate the elements of entitlement under other provisions of the Secretary's regulations.

[11] *Cf. Andersen v. Director, OWCP*, __F.3d__, 2006 WL 2053841 (10th Cir. 2006)(to prove that COPD is legal pneumoconiosis proof is required that coal mine employment was cause).

Dependents

Claimant currently resides with his wife and a daughter. He testified that he pays child support for a son. Tr. 36. In sum, Claimant asserts that he has three dependents. In his first deposition, Claimant did not claim anyone but his wife as a dependant. D-15 at 7. The District Director's proposed award lists Claimant's current spouse as the sole dependent for augmentation of benefits. D-21. The record now contains the birth certificate for Claimant's infant daughter. C-4. There is inadequate documentation of a third dependent, outside of the Claimant's testimony which was unclear on this point. Although Claimant is a credible witness, additional documentation of the child's qualifying dependency would be required for sufficient proof. § 725.208.

CONCLUSION

Claimant has established that he suffers from complicated pneumoconiosis that is due to his coal mine employment. Claimant has therefore proven entitlement to benefits under the Act.[12]

Onset Date

Under § 725.503(b), the date for commencement of benefits is "the month of onset of total disability," but "[w]here the evidence does not establish the month of onset, benefits shall be payable to such miner beginning with the month during which the claim was filed." The evidence does not establish when Claimant became totally disabled. The claim was filed on March 18, 2002. I find that the onset date for the payment of benefits is March 1, 2002.

Attorney's Fee

No award of an attorney's or representative's fee is made herein because no fee application has been received. *See* 30 U.S.C. § 932; 33 U.S.C. § 928. The Claimant's attorney shall have thirty days for submission of a fee application in conformance with Part 725 and the other parties shall have thirty days to file any objection. These periods may be extended by the stipulation of the parties.

ORDER

The claim of L. B. for black lung benefits is granted. Accordingly, the Respondent New Acton Coal Mining Company, Inc. shall:

1. Pay Claimant benefits as required by law and pursuant to § 725.520 in respect of his claim commencing as of March 1, 2002, as augmented by his dependent spouse and daughter.

[12] Any current employment does not affect Claimant's eligibility for benefits pursuant to § 725.504(a)(i).

2. Reimburse the Secretary of Labor for payments made by the Secretary to Claimant, if any, with appropriate credit for any such amounts paid by Respondent to Claimant pursuant to Paragraph 1.
3. Pay Claimant and the Secretary of Labor, as appropriate, interest at the rate applicable under § 725.608.
4. Pay Claimant's attorney, Patrick Nakamura, Esq., Esquire, such fees and expenses as may be approved in a Supplemental Decision and Order.
5. The Director, OWCP, shall make such calculations as are required to give effect to this order.

A

Edward Terhune Miller
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. See 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. See 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed. At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. See 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).